
DATE: September 8, 1992
CASE NO. 85-ERA-27

IN THE MATTER OF

STEVE MCNALLY,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

CASE NO. 85-ERA-29

IN THE MATTER OF

BILLY WEATHERFORD,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

CASE NO. 85-ERA-30

IN THE MATTER OF

JAMES REGISTER,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

CASE NO. 85-ERA-31

IN THE MATTER OF

SUSAN REGISTER,

COMPLAINANT, [1]

v.

GEORGIA POWER COMPANY,

RESPONDENT.

CASE NO. 85-ERA-32

IN THE MATTER OF LESLIE PRICE,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This proceeding arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and is before me for review of the Administrative Law Judge's (ALJ) Recommended Decision (R.D.) issued January 24, 1986.

Complainants were employed at Respondent's Plant Vogtle

[PAGE 3]
facility in Waynesboro, Georgia, and were discharged after either refusing to take or failing drug urinalysis tests. They jointly filed this complaint on May 13, 1985, alleging that the urinalysis tests were imposed upon them as retaliation for protected conduct. A single hearing was convened, at which the parties agreed that the sole issue to be decided at this juncture is whether the complaint is time-barred. The ALJ concluded that it is, and upon consideration of the record, including briefs filed by both parties before me, I agree and accept the ALJ's R. D., as supplemented below. [2]

DISCUSSION

It is undisputed that the May 13 complaint was filed more than thirty days after each Complainant was discharged, in contravention of the filing period expressly prescribed by the

ERA. Transcript (T.) at 7. [3] Although the ERA's thirty-day filing period is subject to equitable modification, *e.g.*, *Larry v. Detroit Edison Co.*, Case No. 86-ERA-32, Sec. Dec. and Ord., June 28, 1991, slip op. at 12, *aff'd sub nom. Detroit Edison Co. v. Secretary. United States Department of Labor*, No. 91-3737 (6th Cir. Apr. 17, 1992), Complainants have failed to show that modification is appropriate here.

Relying on *Charlier v. S.C. Johnson and Son. Inc.*, 556 F.2d 761 (5th Cir. 1977), *reh'g denied*, 559 F.2d 1217 (5th Cir. 1977), and other cases arising under the Age Discrimination in

---

[PAGE 4]
Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1988), Complainants principally argue that their late filing should be tolled until they first learned of their rights under the ERA at the meeting on April 18, 1985, because Respondent failed to post adequate notice of employees' rights under Section 210 of the ERA. [4] In neglecting to post notice, Complainants argue, Respondent deprived them of a meaningful opportunity to become aware of their rights to file a complaint with the Department of Labor (DOL).

Preliminarily, I emphasize that the posting obligation which has given rise to equitable tolling in *Charlier* and other ADEA cases, is imposed by the statute itself -- a Congressional mandate. *See Posey v. Skyline Corp.*, 702 F.2d 102, 104-05 (7th Cir. 1983), *cert. denied*, 464 U.S. 960 (1983). Unlike the ADEA, the ERA contains no requirement that the employer post notice of employees' whistleblower rights. The obligation arises solely from regulations adopted by the Nuclear Regulatory Commission (NRC) in implementing the statute. It is thus questionable whether failure to post pursuant to the NRC regulations should be adopted as an

---

[PAGE 5]
additional basis for equitable tolling under the ERA. Nevertheless, a similar argument has been addressed recently in *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991), and here, as in *Rose*, Complainants have not shown that Respondent failed to comply with the regulatory posting requirements.

According to Complainants, Respondents failed to post an NRC Form 3 at Plant Vogtle as required by 10 C.F.R. §§ 50.7(e) and 21.6(a) (1991). [5] The ALJ credited the testimony of Respondent's witnesses, including the NRC resident inspector, and found that during Complainants' employment, Respondent in fact had posted NRC Form 3 (Version 8/82). R.D. at 6. The ALJ's credibility determination is supported by the record, and I refuse to disregard it based on Complainants' argument that Respondent's witnesses were "interested." *See Pogue v. United States Department of Labor*, 940 F.2d 1287, 1290 (9th Cir. 1991). The ALJ's finding is also consistent with the admissions of Complainants Price and Susan Register at the hearing that after their discharge, a fellow employee acknowledged to them that an NRC Form 3 had been located in his work area at Plant Vogtle during the time they were employed there. T. at 53, 56, 65.

Furthermore, I find no merit in Complainants' alternative argument that even if a form were posted by Respondent, the content of that form was inadequate to inform Complainants of their rights. Complainants contend that NRC Form 3 (Version 8/82) is ambiguous and outdated, and in support of their argument, Complainants submitted a memorandum from the NRC dated September 17, 1984, CX 8, which directed all licensees to post by January 1, 1985, a modified, current version, *i.e.*, NRC Form 3

[PAGE 6]

Section 21.6(a) pertains to posting of other documents.

(Version 9/84). [6] It was stipulated at the hearing that Version 9/84, Respondent's Exhibit 23, was not posted at Plant Vogtle until June 1985, after Complainants' terminations. T. at 139.

The ALJ found that the content of the form posted by Respondent is irrelevant because Complainants testified that they "did not see" any NRC Form 3 and thus, did not detrimentally rely on the content. R.D. at 6. While I do not disagree, I find it additionally compelling that the most specifically applicable regulation, 10 C.F.R. § 19.11(c) (1991), still provides in pertinent part:

> Each licensee and applicant shall post Form NRC-3, (*Revision 6-82 or later*) "Notice to Employees," as required by Parts 30, 40, 50, 60, 70 72, and 150 of this chapter.

(emphasis supplied.) By posting Version 8/82, Respondent complied with the specific codified directive of the NRC. Although I do not condone Respondent for its delay in implementing the NRC's informal directive, in view of the

regulation, I decline to find the NRC's informal directive

[PAGE 7]
dispositive. Furthermore, the fact that the NRC has not amended the regulation at Section l9.11(c) to exclude Version 8/82 contradicts Complainants' position that the NRC finds Version 8/82 wholly inadequate.

Complainants also dispute the ALJ's finding that Respondent posted NRC Form 3 at such places as were calculated to inform Complainants had they chosen to read the form. The record supports the ALJ's finding, however. Respondent posted NRC Form 3 on bulletin boards in the field support or office building, the training building, the warehouse, and various entrance gates, and routinely verified that the forms were posted. T. at 117-119, 122-23, 127-28, 134. Complainants testified that they entered and exited Plant Vogtle from these gates daily and that they also traveled through these other designated locations. In defense of their position, however, Complainants primarily argue that the entrance gates were not a reasonable location because the press of traffic entering and exiting the plant at shift changes made it unlikely that employees would stop and read the notices. The argument is defied by Complainants' own testimony that time permitted reading other posted notices at the gates. Specifically, Complainant Price testified that she read other notices displayed on billboards as she moved along the walk through the gates, as did Complainant Weatherford. T. at 49, 75. Considering this, together with the descriptions of the entrance gate, I find the location of the notice reasonable and "sufficient to permit employees . . . to observe a copy on the way to or from their place of work." 10 C.F.R. § 50.7(e). Similarly, Complainants have not shown that the other locations of the NRC Form 3 were unreasonable. They certainly have not shown the type of circumstances present in *Charlier* where the employee rarely was present physically on the premises. In this case, the notices were posted in accessible locations which provided Complainants a meaningful opportunity of becoming aware of their rights such that I conclude that they should have known of their statutory rights. *See Charlier*, 556 F.2d at 764.

In sum, Respondent properly posted NRC Form 3. The filing period is not tolled because Complainants did not see it or were not aware of their rights. *Kale v. Combined Insurance Co. of America*, 861 F.2d 746, 754 (lst Cir. 1988); *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483, 1486 (11th Cir. 1984). It is well settled that an employee's ignorance of his statutory rights, in itself, will not toll the filing period. *Rose*, 945 F.2d at 1335; *Billings v. TVA*, Case No. 86-ERA-38, Sec. Final Dec. and Ord. of Dismissal, June 28, 1990, slip op. at 9, *aff'd sub nom. Billings v. Dole*, No. 90-3633 (6th Cir. Jan. 25, 1991), *cert. denied sub nom., Billings v. Secretary of Labor*, 59 U.S.L.W. 3850 (U.S. June

[PAGE 8]
24, 1991) (No. 90-7878).

There is another reason why the complaint is time-barred with respect to Complainants Susan Register, Price, Weatherford, and McNally. Under the ADEA, the courts have held that even if an

employer fails to post the requisite notice, the filing period

is not tolled once an employee acquires *general* knowledge of his right not be discriminated against on the basis of age. *Kale*, 861 F.2d at 753; *McClinton*, 743 F.2d at 1486-87. By analogy, I apply that principle here. Each of these four Complainants have stated that they complained to various officials about retaliatory discrimination prior to their terminations, which leads me to conclude that they were generally aware of their rights such that ignorance of specific rights does not toll the filing period. *Id.* Susan Register, Price, and Weatherford each testifled that they had told their supervisors that they thought they were being "discriminated" against. T. at 36-38, 58, 73. McNally, who did not testify at the hearing, alleged in his complaint that over a month before his discharge he had notified the NRC that "management was attempting to intimidate him into leaving his job for expressing his concerns regarding quality assurance." CX 1. Regardless of the NRC Form 3 issue, these four Complainants had sufficient knowledge to send a reasonable person to pursue his or her rights. Instead, they delayed and neglected to follow through. [7]

Although Complainants Price and Susan Register contend that their contact with the NRC within thirty days of their discharges should toll their filing period, I disagree. To the extent these Complainants rely on the principle that permits equitable tolling where an employee files the precise claim in the wrong forum, their

---

[PAGE 9]

reliance is misplaced. Even though these Complainants contacted the NRC during the filing period, they filed no written complaints, *see* 29 C.F.R. § 24.3(c), and the facts do not otherwise present the narrow circumstances contemplated by the cases applying that principle of equitable tolling. *See generally* *Kelly v. Flav-o-Rich, Inc.*, Case No. 90-STA-14, Sec. Final Dec. and Ord., May 22, 1991, slip op. at 2.

Primarily, Complainants Price and Susan Register claim that the filing period should be tolled because the NRC coordinator, Bruno Uryc, misled them by failing to advise them of their statutory remedy and by giving assurances that their "concerns" were being investigated. [8] First, I fully agree with the ALJ's evaluation of the evidence on this issue, *i.e.*, that Uryc did not perceive the concerns raised by these Complainants as involving any allegation of discrimination by Respondent in retaliation for protected activity, Deposition (Dep.) at, *e.g.*, 21, 32, 38, and he did not actively mislead them or lull them into inaction.[9] In virtually identical letters to Price and Susan Register, dated February 26, 1985, Uryc summarized their concerns and requested that they contact him immediately if the summary was not accurate. CX 4, 6. At no point in the letters does Uryc mention their having been discharged, and at no time did these Complainants ever contact Uryc seeking correction of his summary. Dep. at 22, 33. Again, they neglected to follow through.

Furthermore, relying on *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 20-21 (3d Cir. 1981), the Secretary previously has refused to toll the filing period in

a

[PAGE 10]
case where the respondent was in no way responsible, but the complainant delayed and then blamed the NRC coordinator for his failure to file a timely complaint. *Doyle v. Alabama Power Co.*, Case No. 87-ERA-43, Sec. Final Dec. and Ord., Sept. 29, 1989, slip op. at 4-6, *aff'd sub nom. Doyle v. Secretary. United States Department of Labor*, No. 89-7863 (llth Cir. Nov. 26, 1991).

Similarly, I find that the circumstances here do not warrant equitable tolling.

Finally, Complainants contend that they were "diligent" and that principles of fairness demand that the statutory filing period be tolled. For the reasons discussed "supra" at 10 n.7 and based on the same concerns of the Supreme Court in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151-52 (1984), I also reject this argument.

Accordingly, the above-captioned cases are DISMISSED on the basis of an untimely complaint under 42 U.S.C. § 5851.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The caption is modified to correct the spelling of Susan Register. *See* Plaintiffs' (hereinafter "Complainants'") Exhibit (CX) 1.

[2] Attached to a brief Complainants filed before me are additional documents designated by their counsel as PX 9 and PX 10. Respondent's motion that I exclude these belatedly offered documents from the record is granted. Although the evidence was in existence before the time of the hearing, it was never proffered to the ALJ. Complainants' counsel states that this evidence was discovered nine months after the hearing pursuant to a Freedom of Information Act request made by a colleague, however, I conclude that counsel has failed to show that the evidence "was not readily available" to her prior to the hearing had she chosen to inquire. 29 C.F.R. § 18.54(c) (1991). Further, the documents have been examined and I find them immaterial in view of my legal analysis. *Id.*

[3] The ERA provides that employees who believe that they have been discriminated against must file their complaint "within thirty days after such violation occurs . . . . " 42 U.S.C. § 5851(b). The Complainants and their respective discharge dates are as follows: Steve McNally, January 16, 1985; Billy Weatherford, March 1, 1985; James Register, February 27, 1985; Susan Register, January 24, 1985; Leslie Price, February 5, 1985. R.D. at 4.

In the formal complaint, Complainants also refer to several other allegedly discriminatory acts committed by Respondent, but these allegations are factually and legally deficient. Specifically, Complainants allege a subsequent act of discriminatory harassment and intimidation occurring on April 18, 1985, when Respondent's attorney appeared at a meeting attended by Complainants, their attorney, and other workers who were opposed to the urinalysis program. This allegation, though, fails to encompass any adverse personnel action affecting the "terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a); *cf.*

English v. Whitfield, 858 F.2d 957, 963-64 (4th Cir. 1988). Complainants Susan Register and Leslie Price additionally alleged that Respondent's refusal to pay unemployment benefits and refusal to allow them to make withdrawals from the company's saving plan constituted further discriminatory acts, but they never alleged the dates of such refusals. Complainants appear to have abandoned these additional theories altogether since they were not pursued at the hearing and were never seriously debated.

[4] This case arises within the appellate jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See* 29 C.F.R. § 24.7(a) (1991). The Eleventh Circuit, in the en banc decision, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent, decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[5] Regulatory Section 50.7(e) provides in pertinent part:

> Each licensee, permittee and each applicant shall post Form NRC-3, "Notice to Employees," on its premises. Posting must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work.

[6] CX 8 was not proffered to the ALJ until well after the hearing when Complainants' counsel stated that the document had "just come to her attention." Over Respondent's objection, the ALJ admitted the document into evidence as highly relevant, new evidence. He then found it appropriate to allow Respondent "to respond to that evidence" and granted Respondent's motion to submit into evidence the post-hearing deposition of Bruno Uryc, an NRC Investigation/Allegation Coordinator. Complainant challenges that ruling. Reluctantly, I will accept both of the ALJ's rulings to allow these highly probative, albeit late, documents into evidence. 29 C.F.R. § 24.5(e)(1). I note, however, that it is a close question whether Complainants' counsel made a sufficient showing that CX 8 "was not readily available prior to the hearing." *See* 29 C.F.R. § 18.54(c). In turn, I cannot conclude that it was improper for the ALJ to allow Respondent to submit Uryc's post-hearing deposition on a theory not clearly delineated prior to the hearing. *See Yellow Freight System Inc. v. Martin*, 954 F.2d 353, 357-59 (6th Cir. 1992).

[7] Complainants Susan Register and Price maintain that they contacted a number of associations and government agencies within thirty days of their terminations, including the National Organization for the Reform of Marijuana Laws; the National Organization for Women; the National Labor Relations Board; and the Georgia Department of Labor, but were never informed of their ERA remedy. First, I question the precise focus of their inquiries with these organizations. The substance of the inquiries and the responses was never discussed fully. *Cf. Miller v. Marsh*, 766 F.2d 490, 493 (11th Cir. 1985) (employee received erroneous and conflicting instructions on how to pursue her Title VII claim, on which she attempted to follow through). Further,

Complainants Susan Register and Price had sufficient knowledge of their rights to continue, once they were dissatisfied with the responses from these organizations, pursuing their claims. Moreover, they claim they also spoke with private attorneys, T. at 46; 70, which has been held to provide, in itself, "the means of knowledge" sufficient to preclude equitable tolling. *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).

[8] In contrast, this is not a case like those cited by Complainants where the employee acted in reliance on misrepresentations by the employer or a directly responsible government agency or entity. Complainants are not alleging that they were misled by Respondent or the DOL. *See* T. at 55. *Cf. Chappell v. Emco Machine Works Co.*, 601 F.2d 1295, 1303 (5th Cir. 1979).

[9] According to Uryc, Complainants were concerned about the technique of the urinalysis and misuse of the drug hotline with attendant harassment by fellow employees, not Respondent, and were concerned that Respondent was purposely omitting from termination reports the fact that individuals were being terminated for drug abuse in order to avoid an NRC directive to reinspect the work previously performed by those individuals. Dep. at 18-19, 25-26, 29-30, 32, 35; *cf.* Dep. at 36.